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In The

Supreme Court of the United States

ROMANO SALVATORI,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act ("ADEA") provides the court "shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

A jury specifically found that employee was wrongfully terminated in violation of the ADEA, but awarded zero dollars ($0.00) in damages because employee was successful in fully mitigating his wage losses in the years between wrongful termination and trial. The trial court entered judgment for employee on the jury's verdict, and instructed employee to make application for costs and attorney's fees. The Court of Appeals reversed, holding the judgment that employee was discriminated against in violation of the ADEA was insufficient to make employee a prevailing party entitled to attorney's fees and costs because the jury awarded no damages.

The questions presented are:

1. Whether an employee who is awarded a judgment on the merits of an age discrimination claim must, in addition, establish that he or she is a "prevailing party" before the statutorily mandated attorney's fees and costs can be awarded?

2. Alternatively, whether reasonable attorney's fees are an integral part of a judgment on the merits of an ADEA claim, making the judgment winner a "prevailing party" as defined by this Court?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-7a) is reported at 190 F.3d 1244. The order of the district court (App., infra, 8a-13a) is unreported. The judgment of the district court (App., infra, 14a) is reproduced in the Appendix hereto.

JURISDICTION

The Court of Appeals entered its judgment on September 30, 1999. (App., infra, 7a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 626(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b) provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216

> (except for subsection (a) thereof), and 217 of this title and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

29 U.S.C. §216(b), containing the attorney's fee and costs provision applicable to actions under the ADEA provides, in relevant part:

> . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

STATEMENT OF THE CASE

The end of Romano Salvatori's twenty-nine and one half (29+) year career with Westinghouse was foreshadowed in mid-1993 when Michael Jordan became the company's C.E.O., and brought with him a management philosophy of pushing young executives upward. (R18-160-90; R18-160-91; R18-160-119 to 120) Older executives interfered with Jordan's philosophical goals by blocking advancement opportunities. (R18-160-91 to 92; R18-160-120 to 121; R18-160-128 to 129) This was graphically evidenced at a 1994 Chairman's Initiative session in which a participant commented:

> *"In many of our businesses we have an older workforce . . . [O]ur low growth businesses can strain opportunities for younger workers. Somehow we must provide those opportunities. We have to get the 'blockers' out of the way."*

(Pltf. Ex. 26.)

And Mr. Jordan responded:

> *"As we roll out this Leadership Development Process over the next year, we have to put ourselves in a position of getting high [potentials] into more responsible jobs and move the blockers aside.* That's hard to do, and no one likes to do it, but we're paying the price now for our inability to do it in the past."

(Pltf. Ex. 26.)

Shortly after that exchange, Mr. Salvatori was replaced as manager of the Power Generation Projects Division of the Power Generation Business Unit [a division he had created five years before, and which achieved

annual earnings of a half-billion dollars] by a thirty-nine year old. (R18-160-81 to 82; R18-160-141) He was reassigned as General Manager of the newly-created Strategic Affairs Division of the Power Generation Unit, a position eliminated a few months later as a "cost reduction measure." (R18-160-141; R18-160-171 to 172)

At age fifty-six, and after being awarded his company's highest honor (the Westinghouse Order of Merit, which must be approved by the Board of Directors), Romano Salvatori's career at Westinghouse was over. (Pltf. Ex. 107; R18-160-49; R18-160-88)

After receiving his termination notice, Petitioner accepted an offer from Tucson Electric Power Company to organize and manage Nations Energy, a new subsidiary. (R18-160-56; R18-160-178 to 179) He began work with Nations Energy on December 1, 1994 – the day after his termination became effective – at a salary Twenty Thousand Dollars ($20,000.00) lower than his Westinghouse salary. (R18-160-180 to 183)

It is uncontroverted that, while still receiving a lower salary, Mr. Salvatori commenced this action in the United States District Court for the Middle District of Florida to recover the wage losses and attorneys' fees caused by the wrongful termination of his employment. *Id.* Jurisdiction was invoked under the Age Discrimination in Employment Act, 29 U.S.C. §§621-634, and under 28 U.S.C. §1331. (R1-1) Petitioner then set about to grow Nations Energy.

Mr. Salvatori was successful in building Nations Energy, and was rewarded with increased salary and bonuses. (R18-160-185 to 187; R19-161-315) As a result, by the time the case reached trial, he had off-set the wage

differential, and could seek as wage loss damages only the difference between stock options he may have received from Westinghouse and bonuses he received at Nations Energy.

At the conclusion of the trial, the jury was given, and answered, the following Interrogatories:

1. Do you find that Plaintiff has proved by a preponderance of the evidence that Defendant discriminated against him because of his age?

   YES X NO __

   * * *

2. What is the amount of back pay, if any, that Plaintiff has proved by a preponderance of the evidence he is entitled to receive from the date of his termination until the date of your verdict?

   $ -0-

3. What is the amount of front pay, if any, that Plaintiff has proved by a preponderance of the evidence he is entitled to receive from and after the date of your verdict?

   $ -0-

4. What is the amount of pension benefits, if any, that Plaintiff has proved by a preponderance of the evidence he is entitled to receive?

   $ -0-

5. Do you find that Plaintiff has proved by a preponderance of the evidence that Westinghouse willfully violated the law?

YES __ NO X

(R14-119)

The District Court then entered the following judgment order:

> IT IS ORDERED AND ADJUDGED that the jury in the above entitled cause having found in favor of the plaintiff on his claim of Age Discrimination in Employment, and the jury having found that such discrimination was not willful and awarded no monetary damages on the issues of back pay, front pay or pension benefits, judgment is hereby entered in favor of plaintiff ROMANO SALVATORI on his claim and against the defendant WESTINGHOUSE ELECTRIC CORPORATION. Plaintiff may make application for his costs of action in accordance with the law and Rules of this Court.

(R14-123; App. 14a)

Respondent filed a motion to alter or amend the judgment in which it argued, inter alia, that Plaintiff was not a "prevailing party" entitled to attorney's fees and costs.[1] (R14-126; R17-170-58 to 62) Respondent, Westinghouse also argued that *it* should be awarded fees and costs because the jury's failure to award damages made

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[1] Petitioner filed a motion for costs and attorney's fees which was referred to a Magistrate Judge. (R14-128; R14-129; R14-130) The Magistrate Judge denied that Motion, without prejudice, pending resolution of Westinghouse's appeal from the order denying its motion to alter or amend judgment.

Westinghouse – the party specifically found to have violated the law – the prevailing party in the case. *Id.*

The District Court denied Respondent's motion to alter or amend the judgment, holding that the award of attorney's fees and costs to the judgment winner is mandated by, and consistent with the purposes of, the ADEA; and is not governed by whether the plaintiff is a "prevailing party" within the meaning of F.R.Civ.P. 54(d), Title VII or 42 U.S.C. §1988. (R16-153; App. 9a-13a)

Westinghouse appealed the order denying its motion to alter or amend the judgment. (R16-157) A panel of the United States Court of Appeals for the Eleventh Circuit reversed and remanded. (App. 1a-3a) The panel believed it was bound by *Nance v. Maxwell Federal Credit Union*, 186 F.3d 1338 (11th Cir. 1999), in which another panel of the same court held that an employee who never sustained damages as a result of employment discrimination was not a "prevailing party" entitled to an award of attorney's fees. (App. 1a-7a) Circuit Judge Birch, concurring said:

> "I write separately to note that our decision to construe the ADEA as requiring what is tantamount to a 'prevailing party' status for purposes of a litigant's entitlement to attorney's fees is not self-evident from the plain language of the statute."

(App. 3a-4a)

Senior Circuit Judge Bright, also concurring separately, wrote:

> "If I were to decide this issue on a clean slate . . . I would not so hold. Although the Supreme Court's opinion in *Hewitt v. Helms*

> . . . and its progeny generally limit the availability of attorney's fees under both Title VII and 42 U.S.C. §1988(b), it is not at all clear to me that such limitations should be adopted wholesale into the developing law of the ADEA. . . . The [ADEA's] substitution of the phrase 'any judgment' for 'prevailing party' is an important modification, and I believe it warrants a different analysis."

(App. 6a-7a)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS CONTRARY TO, AND FRUSTRATES, A CONGRESSIONAL POLICY OF THE HIGHEST PRIORITY BY IMPEDING THE ABILITY OF EMPLOYEES TO EXPOSE DISCRIMINATORY EMPLOYMENT PRACTICES.

By bringing to light his employer's discriminatory practices, Romano Salvatori furthered the primary purpose Congress sought to achieve in enacting the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* The ADEA is not merely a means of compensating employees who suffer age discrimination. Rather, the expressly stated congressional purpose is to end age discrimination in the workplace. 29 U.S.C. §621(b).[2] Discriminated-against employees are the instrument Congress

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[2] In this limited respect, the ADEA mirrors Title VII. *See, Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219, 230 (1982): "Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits. But when unlawful

has chosen to vindicate the Act's purpose; and that purpose is furthered every time a discriminatory employment practice is brought to light. As made clear in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 358-359 (1995):

> "The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act."

To effectuate the Congressional policy, the remedial provisions of the ADEA are aimed toward encouraging employees to bring discriminatory practices to light by providing both compensation for wage losses *and* by mandating that the employee be awarded reasonable attorney's fees and costs. Accordingly, the enforcement provisions of the ADEA, 29 U.S.C. §626(b), expressly incorporate the remedial provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). Section 216(b) of the FLSA mandates that, in addition to any reinstatement, promotion and compensation remedies awarded to

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discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries."(Emphasis in original)

the discriminated-against employee, the court shall award reasonable attorney's fees and costs:

> "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

This Court has recognized that the mandatory language was purposefully chosen by the Congress, and is distinctly different from the "prevailing party" language in the remedial provisions of other Civil Rights statutes. *See, Lorillard v. Pons*, 434 U.S. 575 (1978), discussed *infra* this Petition.

This Court has also expressly recognized that the role private litigants play in exposing discriminatory employment practices "vindicates the important congressional policy against discriminatory employment practices. . . . " *McKennon*, 513 U.S. at 358.[3] It is evident that an employee's ability to recover attorney's fees is indispensable if private litigants are to be encouraged to fulfill that role and bring discriminatory practices to light. That is all the more evident because employees who suffer age discrimination are those who are most likely to lack the resources required to fund the litigation. As stated in

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[3] *See also, Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989): "The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages. . . . [W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."

Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 11 (D.C. Cir. 1984), *cert. den.*, 472 U.S. 1021 (1985), *overruled on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988):

> "Fair Labor Standards Act of 1938 and Title VII of the Civil Rights Act of 1964 authorize district courts to award a reasonable attorney's fee. . . . The purpose of such provisions is to encourage private litigants to act as 'private attorneys general' on behalf of enforcement of the civil rights laws. Congress clearly hoped to provide an adequate economic incentive for private attorneys to take employment discrimination cases, and thereby to ensure that plaintiffs would be able to obtain competent legal representation for the prosecution of legitimate claims."

However, the ADEA also obligates victims of age discrimination to make reasonable efforts to mitigate wage losses caused by an employer's discriminatory practices and, employees who do not fulfill that duty or who are successful in mitigating wage loss damages are not entitled to damages for wage losses. *See, Smith v. Great American Restaurants*, 969 F.2d 430, 438 (7th Cir. 1992) and *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 829-830 (2nd Cir. 1992).

Faithful to the duty to mitigate damages, Romano Salvatori commenced new employment the day following his wrongful termination and, although starting at a substantially lower salary, eradicated the salary loss caused by his wrongful termination before trial commenced. (R18-160-185 to 187; R19-161-315) Thus, although specifically finding that Romano Salvatori was the victim of age discrimination, the jury awarded him neither the back-pay nor front-pay damages he initially sought, but

which he had mitigated. (R14-119) The Court of Appeals, ignoring the jury's verdict that Romano Salvatori was the victim of age discrimination, and the judgment entered on that verdict, focused upon the fact the jury awarded no back-pay or front-pay damages and held that because no damages were awarded, Mr. Salvatori was not a "prevailing party". (App. 1a-7a) That holding absolved the employer of all liability for the payment of the substantial costs and attorney's fees incurred in exposing the employer's discriminatory employment practices. (R14-128; R14-129; R14-130)

The decision of the Court of Appeals denying recovery of attorney's fees and costs, to an employee who establishes wrongful discrimination, but who mitigates wage loss damages, frustrates congressional policy by discouraging employees from pursuing valid discrimination claims. ADEA litigation is expensive, particularly when the unlawful practices are committed by a multinational corporation with vast resources. Moreover, it often pits a worker who has lost his or her job against an employer better able to assume the cost of litigation. The ADEA mandate that an employee who receives a judgment shall be awarded attorney's fees and costs is intended to level that playing field by enabling employees with factually strong claims to obtain competent counsel and vindicate the important congressional policy the ADEA is intended to effectuate.

Most terminated employees with factually compelling claims will have an immediate wage loss. However, the victims of employment discrimination must mitigate damages. And, because attorney's fees and costs can be awarded only after judgment, 29 U.S.C. §216(b), neither

the victim of age discrimination nor any attorney he or she consults will know prior to trial whether there will be any back-pay or front-pay damages to recover.

While some wrongfully discharged employees may be willing to pursue factually strong ADEA claims if a judgment of discrimination alone triggers the allowance of the costs and fees such a suit will entail, few employees are likely to "gamble" they will be unable to offset their wage losses in the long interval between discharge and trial. The message sent by the Circuit Court's decision is that a discriminated against employee who might possibly mitigate damages cannot afford the risk of litigation, no matter how badly he or she has been treated and no matter how egregious the employer's conduct.

By making the statutorily mandated attorney's fees and costs subject to the award of wage loss damages, and not to the finding of discrimination, the Court of Appeals frustrates the congressional purpose by discouraging and impeding the ability of terminated employees to bring discriminatory employment practices to light. The ADEA makes clear that discriminated against employees are "the chosen instrument of Congress to vindicate 'a policy that congress considered of the highest priority.' "[4] Thus, any holding that impedes the employee's ability to bring

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[4] The quoted language is from *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978), dealing with Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. That the language is equally applicable to ADEA plaintiffs is clear. *See, McKennon*, 513 U.S. at 358.

discriminatory practices to light is contrary to, and frustrates, the "highest priority" congressional policy set forth in the ADEA.

Moreover, the decision of the Court below subverts congressional policy by elevating the ADEA's "secondary, fallback purpose" of providing compensation to victims of discrimination above its primary purpose of putting an end to discrimination. *Ford Motor Company*, 458 U.S. at 230; *McKennon*, 513 U.S. at 358-359.

Because the decision of the Court of Appeals is contrary to, and subverts, the ADEA's expressly stated purpose, review is warranted.

II. THE DECISION OF THE COURT OF APPEALS DISREGARDS THE ADMONITIONS OF THIS COURT, AND IS CONTRARY IN PRINCIPLE TO THE DECISIONS OF THIS COURT.

A. By Applying A "Prevailing Party" Standard, the Court Below Ignored the Unambiguous Language of the ADEA and the Holding of this Court in *Lorillard v. Pons*:

The ADEA states in clear and unambiguous terms that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." *See*, 29 U.S.C. §626(b), incorporating the remedial provisions of the FLSA, 29 U.S.C. §216(b). The ADEA does not condition the award of legal fees and costs upon plaintiff being a "prevailing party", as do numerous other civil rights statutes; nor does the ADEA contain any mention

of or reference to the term "prevailing party". Nonetheless, the Court of Appeals determined that Romano Salvatori is not entitled to attorney's fees and costs because he is not a "prevailing party" as that term has been defined by this Court. *See, Hewitt v. Helms*, 482 U.S. 755 (1987); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989); and *Farrar v. Hobby*, 506 U.S. 103 (1992). However, in every one of those cases, the applicable statute makes the award of legal fees discretionary *and* expressly authorizes the award of such fees only to a "prevailing party". Conversely the ADEA *mandates* that such fees be given to a plaintiff who is awarded a judgment.

In basing the right to ADEA-mandated attorney's fees and costs upon decisions interpreting the remedial provisions of the Civil Rights Acts, the Court of Appeals disregarded the clear admonition of this Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), that it is the expressly selected remedial provisions of the FLSA, and not the remedial provisions of other Civil Rights Acts, that are controlling in interpreting the ADEA. *Lorillard* makes clear the enforcement scheme of the ADEA was not inadvertent, but was the product of considerable congressional attention. As stated in *Lorillard, supra*:

> "The enforcement scheme of the [ADEA] statute is complex – the product of considerable attention during the legislative debates preceding passage of the Act. . . .
>
> . . .
>
> The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory

> scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes. . . .
>
> . . .
>
> *This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."*

434 U.S. at 577-583 (emphasis and bracketed matter added).

Moreover, focusing specifically upon the remedial provisions of the FLSA and of the Civil Rights Acts – the very provisions at issue in this case – this Court recognized there are significant differences in the two statutes:

> "[I]n deciding whether a statutory right to jury trial exists, *it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences."*

Lorillard, 434 U.S. at 584 (emphasis added). Thus, in the instant matter, as in *Lorillard*, the remedial provisions governing the award of attorney's fees under Title VII or 42 U.S.C. §1988 "shed[s] no light on congressional intent under the ADEA". *Lorillard*, 434 U.S. at 585. By ignoring the very different language of §216(b) of the FLSA, and focusing entirely upon the "prevailing party" analysis applicable to civil rights statutes with significantly different remedial provisions, the Court of Appeals ignored

both the applicable statutory language and the admonitions of this Court.

It is uncontroverted the jury found that Westinghouse discriminated against Romano Salvatori because of his age; and that the trial court entered judgment on the jury's verdict as mandated by Fed.R.Civ.P. 49(b). (R14-119; R14-123; App. 14a) No decision of this Court supports the lower court's ruling that such a judgment is insufficient to trigger the award of attorney's fees and costs the ADEA mandates be awarded to the judgment winner. In relying upon wholly inappropriate "prevailing party" cases to deny the judgment winner his legal costs, the lower court misconstrued, misapplied and ignored the teachings of this Honorable Court, and ran roughshod over the language Congress deliberately set forth in the ADEA. That blatant disregard of language and precedent, if unremedied, will chill the willingness of victimized employees to pursue age discrimination claims and thwart the congressional purpose.

B. The Opinion Below, Allowing an Employee's Subsequent Mitigating Efforts to Absolve a Discriminating Employer from the Obligation to Pay Attorney's Fees and Costs, is Contrary in Principle to the Decision of this Court in *McKennon v. Nashville Banner Publishing Company*.

McKennon v. Nashville Banner Publishing Company, 513 U.S. 352 (1995), makes clear that termination of an employee in violation of the ADEA is not remedied by the employer's subsequent obtaining of information that, had it been known, would have justified the termination.

The reason for that holding is that the allowance of post-discrimination occurrences to obviate the discriminatory conduct is contrary to the ADEA's stated goal of eliminating discrimination in the workplace. As this Court stated:

> "Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination. . . .
>
> *It would not accord with this scheme if after-required evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act.*"

McKennon, 513 U.S. at 358 (emphasis added).

If the legislative scheme prohibits use of an employee's subsequently discovered *wrongful* conduct to excuse an employer's violation of the ADEA, it necessarily follows that the employee's subsequent *lawful* conduct in mitigation cannot be used for that purpose. Yet, that is precisely what the Court of Appeals did in this case.

The legislative goal in enacting the ADEA was to end discrimination in the workplace. Thus, consistent with that goal, the employee's efforts in mitigation can only be used to reduce or eliminate back-pay and front-pay damages. Those lawful efforts cannot be used to absolve an employer who is expressly found to have acted in violation of the ADEA from the mandatory duty of paying the legal fees and costs incurred by an employee who is awarded a judgment on his or her discrimination claim,

and was successful in exposing the discriminatory practice.

By absolving Westinghouse of all consequences of its unlawful conduct, and imposing the cost of the litigation upon the employee who exposed that wrongful conduct, the Court of Appeals has rendered a decision that conflicts with the principle of *McKennon* and which does violence to the expressly stated goal of the Congress.

III. THE DECISION OF THE COURT BELOW MISCONSTRUES, AND MISAPPLIES, THE DECISIONS OF THIS COURT DEFINING THE TERM "PREVAILING PARTY".

The ADEA conditions a plaintiff's right to attorney's fees and costs upon the award of a judgment; and mandates that such fees be given to a judgment winner.[5] The Act does not require that the judgment winner also be a "prevailing party". Thus, by reading that additional requirement into the ADEA, the Court of Appeals went beyond the scope of permissible judicial inquiry. As made clear in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992):

> "We have stated time and again that courts must presume that a legislature says in a statute what

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[5] This Court has repeatedly observed the award of 29 U.S.C. §216(b) attorney fees are mandatory. *See, McKennon*, 513 U.S. at 362 ("[W]e think the authority for the courts to award attorney's fees, mandated under the statute, 29 U.S.C. §§216(b), 626(b) . . . will deter most abuses."); *Aleyska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240, 261 n. 34 (1975); and *Christianburg Garment Co.*, 434 U.S. at 415 and n. 5.

> it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "

Moreover, the Court of Appeals' holding that a plaintiff who receives a judgment on the merits of an age discrimination claim is not a "prevailing party" is contrary to the decisions of this Court defining that term. In summarizing those decisions, this Court said:

> "Under our 'generous formulation' of the term, plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

Farrar, 506 U.S. at 109. A plaintiff who obtains a judgment on the merits of an ADEA claim both "succeed[s] on a significant issue in litigation" *and* "achieves some of the benefit sought". Thus, such a plaintiff satisfies all requirements this Court enumerated in *Farrar, supra.*

In obtaining a judgment on the merits of his ADEA claim, Romano Salvatori exposed the employer's discriminatory practices. Because "[t]he objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her", *McKennon*, 513 U.S. at 358, it is evident Mr. Salvatori succeeded on a significant issue in the litigation, satisfying the first part of the *Farrar* test.

Moreover, as the Complaint makes clear, Romano Salvatori sought to recover from his employer both the

wages he claimed to have lost *and* the statutorily mandated attorney's fees and costs. (R1-1) Courts have no discretion to deny the statutorily mandated fees to plaintiffs awarded judgment on the merits of an ADEA claim. *See, Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994), *cert. den.*, 513 U.S. 875 (1994); *Sabey v. United States*, 6 Cl. Ct. 36 (U.S. Cl. Ct. 1984); and *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996). *See also, Bankston v. State of Illinois*, 60 F.3d 1249, 1255 (7th Cir. 1995) (§216(b) of FLSA directs award of reasonable fees and costs); *Equal Employment Opportunity Commission v. O & G Spring and Wire Forms Specialty Company*, 38 F.3d 872, 882 (7th Cir. 1994), *cert. den.*, 513 U.S. 1198 (1995) (ADEA attorney's fee provision is mandatory); *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950, 961 (5th Cir. 1993), *cert. den.*, 513 U.S. 875 (1994) (same).[6] Thus, an integral part of any judgment on the merits is an award of legal fees. After the judgment, only the amount of the fees, and not the defendant's legal duty to pay them, remains to be determined. As recognized by the district court in this case, and by an earlier panel of the Court below, the statutorily mandated attorney's fees are an integral part of, and not collateral to, the judgment that Romano Salvatori was terminated in violation of federal law. As stated by the Court:

> "We find that the language of the two statutes [42 U.S.C. §1988 and 29 U.S.C. §216(b)] differs significantly regarding the award of attorney

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[6] The Fourth Circuit has reached the same conclusion applying the identical attorney's fee language of the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq. McDonnell v. Miller Oil Company, Inc.*, 134 F.3d 638, 640-41 (4th Cir. 1998).

> fees. Section 216 provides for an award of attorney's fees, as opposed to granting the court discretion in awarding such fees, to the prevailing plaintiff in FLSA cases. *In consideration of the language of section 216(b) and its underlying purpose, we hold that attorney fees are an integral part of the merits of FLSA cases and part of the relief sought therein."*

Shelton v. Ervin, 830 F.2d 182, 184 (11th Cir. 1987). (Emphasis and bracketed matter added).[7]

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[7] Two weeks after *Shelton v. Ervin* was decided, another panel of the Eleventh Circuit held that ADEA attorney's fees are "extraneous to, rather than central to, the merits" of the case. *Taylor v. Texgas Corp.*, 831 F.2d 255, 258 (11th Cir. 1987). The panel did not cite, nor mention, the earlier opinion in *Shelton*. The fact that the panel decision in *Shelton* is binding upon other panels of the same court (including the panel subsequently deciding *Taylor*), coupled with the fact that the issue is not whether the mandatory award of attorney's fees is "extraneous" or "central" to the merits, but whether it is an integral part of any judgment on the merits, deprives *Taylor* of precedential worth. The panel in the instant case did not refer to either *Shelton* or *Taylor*, nor did it discuss the crucial issue of whether the attorney fees authorized by §216(b) are an integral part of the relief afforded to the victim of age discrimination.

The holding in *Shelton* that attorney's fees are an integral part of the judgment on the merits is consistent with the holding in *Johnson v. University of Bridgeport*, 629 F.2d 828, 829 (2d Cir. 1980), *overruled on other grounds, Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1983), where the court held that the statutorily mandated legal fees are "just another part of the relief sought by the plaintiffs" in age discrimination cases; and *J.J. Schneider & Son, Inc. v. Justice*, 293 Ky. 126, 168 S.W.2d 591, 592-593 (1943), holding that "the federal act [FLSA] clearly indicates . . . that the reasonable attorney's fees to be allowed . . . is an integral part of the amount sought to be recovered."

Because it is the judgment on the merits of the ADEA claim, and not any subsequent judicial action, that determines the employer's *legal obligation* to pay fees, the holding that such fees are an integral part of the judgment is both logically and legally sound. And, because the judgment carries with it the right to an award of the substantial legal fees, sought as damages in the Complaint, it is evident Romano Salvatori achieved a portion of the benefit he sought in bringing suit. While recovery of legal fees and costs may be a small portion of the substantial wage loss damages initially sought, they are more than equal to the nominal damages this Court has recognized are sufficient to make one a "prevailing party". *Farrar, supra.*

It does not matter if Romano Salvatori fully or partially mitigated damages. It does not matter how or why the jury concluded he sustained no wage loss damages. All that matters is that the jury found that Westinghouse discriminated against Romano Salvatori because of his age; and that the ADEA mandates the award of attorneys' fees as part of the damages.

The court below misapplied this Court's precedents by holding an ADEA judgment winner must be a "prevailing party" to receive attorneys' fees; and by holding that an employee who receives a judgment on the merits of an age discrimination claim is not a "prevailing party".

Because the decision of the Court of Appeals conflicts in principle with decisions of this Court, and because it frustrates an important congressional policy, review is warranted.

CONCLUSION

The message sent by the opinion of the court below discourages employees from exposing, and employers from remedying, discriminatory employment practices. Moreover, it encourages employers to "dig in their heels" and engage in protracted and costly litigation in the hope that both wage losses and the employee's ability to pursue the claim will disappear. This message is contrary to the ADEA's stated goals of ending age discrimination in the workplace.

Petitioner respectfully requests that this petition be granted so that the final message is compatible with the congressional intent.

Respectfully submitted,

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Romano SALVATORI, Plaintiff-Appellee,

v.

WESTINGHOUSE ELECTRIC CORPORATION, Defendant-Appellant.

No. 98-2257.

United States Court of Appeals,
Eleventh Circuit.

Sept. 30, 1999.

Glen D. Nager, Rayne Rasty, Deborah A. Sudbury, Atlanta, GA, John Nalbandian, Jones, Day, Reavis & Pogue, Washington, DC, for Defendant-Appellant.

Eric P. Reif, William Pietragallo, II, Bryan K. Shreckengost, Pittsburgh, PA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and BIRCH, Circuit Judges, and BRIGHT*, Senior Circuit Judge.

PER CURIAM:

Romano Salvatori, a former employee of Westinghouse Electric Corporation ("Westinghouse"), filed this action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621-34 (1994). Following

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

a jury trial, the jury found that Westinghouse had discriminated against Salvatori based on his age, but that Salvatori was not entitled to the damages he sought. The district court entered judgment in favor of Salvatori and, as part of that judgment, allowed him to apply for attorney's fees. Westinghouse filed a motion to alter or amend the judgment. In that motion, Westinghouse asked the court to enter judgment in favor of Westinghouse, to allow Westinghouse to recover its costs, and to eliminate that portion of the judgment that allowed Salvatori to apply for costs. Salvatori subsequently moved for reasonable attorney's fees and costs. Westinghouse opposed the motion on the ground, *inter alia*, that Salvatori was not a "prevailing party" and, therefore, was not entitled to attorney's fees. *See* R15-138 at 3-5. The district court denied Westinghouse's motion to alter or amend the judgment, and concluded that Salvatori was entitled to attorney's fees and costs. The court noted that, although other analogous civil rights legislation required that a plaintiff "prevail" in a lawsuit to give rise to an entitlement to attorney's fees, the ADEA did not share identical fee-shifting language to that present in statutes identified by Westinghouse. The court further found that the ADEA mandated an award of attorney's fees to a plaintiff who had been awarded "any judgment," *see* R16-153 at 5, and that term encompassed a judgment based solely on the merits. Westinghouse appeals the district court's decision to deny its motion to alter or amend the judgment and, again, argues that Salvatori is not entitled to attorney's fees.

While this appeal was pending, we addressed and decided precisely the question at issue in this case – that

is, whether a plaintiff who obtains a favorable jury verdict on the merits of an ADEA claim, but receives no damages, is entitled to attorney's fees. In *Nance v. Maxwell Fed. Credit Union*, ___ F.3d ___, (11th Cir.1999), we determined that a plaintiff who had succeeded on the merits of an ADEA claim nonetheless had failed to prove injury based on that discriminatory conduct. Based on this finding, we vacated the district court's award of back pay and front pay. *See id.* at ___. Furthermore, we reasoned that, because the plaintiff had not received an enforceable judgment and, as a result, had not "prevailed," as that term has been used in other civil rights contexts, she also was not entitled to attorney's fees. *See id.* at ___.

We conclude that our decision in *Nance* directly controls our disposition of the instant case. Like the plaintiff in *Nance*, Salvatori has achieved success on the merits of his claim but has not obtained a judgment, either in the form of damages or equitable relief, that the court may enforce against Westinghouse. Consistent with our decision in *Nance*, therefore, we determine that Salvatori is not entitled to attorney's fees. We therefore REVERSE the district court's order denying Westinghouse's motion to alter or amend the judgment, and REMAND this case for further proceedings in light of this opinion.

REVERSED AND REMANDED.

BIRCH, Circuit Judge, concurring:

I write separately to note that our decision to construe the ADEA as requiring what is tantamount to a "prevailing party" status for purposes of a litigant's entitlement to attorney's fees is not self-evident from the

plain language of the statute. In fact, notwithstanding the frequent and consistent use of the term "prevailing party" by our court and other circuit courts to refer to a *successful* litigant within the context of the ADEA, the statute contains no such language. The ADEA, which incorporates selected provisions of the Fair Labor Standards Act ("FLSA"), including those pertaining to attorney's fees, *see* 29 U.S.C. § 626(b), mandates that "[t]he court in such [an] action [filed pursuant to this section] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

Unlike the ADEA, however, both Title VII, 42 U.S.C. § 2000e-5k, and 42 U.S.C. § 1988(b), the primary vehicles for the majority of civil rights litigation, provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[1]" The Supreme Court has held explicitly that "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party' " under § 1988. *Hewitt v. Helms*, 482 U.S. 755, 763, 107 S.Ct. 2672, 2677, 96 L.Ed.2d 654 (1987). Moreover, we have applied the Supreme Court's directive in *Hewitt* to cases brought

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[1] Section 1988 does not duplicate Title VII's provision regarding either expert fees or the potential liability of the United States or the Commission as tantamount to that of private parties.

under Title VII. In *Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir.1991), for instance, we found that, although the plaintiff had won a favorable determination on the ultimate factual issue in the case – that is, that she had been sexually harassed – , the reasoning of *Hewitt* mandated that "such a finding, without more, will not ordain a litigant the prevailing party." 944 F.2d at 847. We further observed that "to be a prevailing party for purposes of [Title VII] requires the attainment of something more tangible than a jury finding of sexual harassment." *Id.*

Although it is critical to note that the procedural framework of Title VII and section 1988 is not identical to that set forth in the ADEA, it is reasonable to extrapolate salient aspects of the Supreme Court's discussion of what constitutes a "prevailing party" under Title VII and section 1988 for purposes of our analysis of what constitutes "any judgment" under the ADEA. In *Hewitt*, again, the Court expressly observed that

> [t]he real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*
>
> *Hewitt*, 482 U.S. at 761, 107 S.Ct. at 2676. It is fair to say that the Court's reasoning in *Hewitt*, while not conclusively controlling or dispositive of an analogous ADEA case, necessarily informs our decision relative to the question of whether a litigant who has succeeded only on the merits of her claim – but has received no "judicial resolution," id., *is* entitled to attorney's fees.

Thus, while I do not believe that we may, in essence, import the term "prevailing party" into the ADEA, I agree that, in light of the Supreme Court's directive in *Hewitt* as applied by our court in the context of both Title VII and section 1988, an ADEA plaintiff is only entitled to attorney's fees if, in addition to succeeding on the merits of any part of her claim, the judicial resolution of the action settles some dispute that affects the behavior of the defendant toward the plaintiff. Because no such judicial resolution transpired as a result of the jury verdict in this case, I agree that Salvatori is not entitled to attorney's fees.

BRIGHT, Senior Circuit Judge, separately concurring:

I agree that this court's recently announced decision in *Nance v. Maxwell Federal Credit Union* (11th Cir. (Ala.)), controls the disposition of the case now before us. It is now the rule, at least in this circuit, that unless there is an "enforceable judgment" – irrespective of whether a defendant has been found liable for unlawful discrimination – attorney's fees are not available under the ADEA. I therefore concur in the result reached by our panel.

If I were to decide this issue on a clean slate, however, I would not so hold. Although the Supreme Court's opinion in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), and its progeny generally limit the availability of attorney's fees under both Title VII and 42 U.S.C. § 1988(b), it is not at all clear to me that such limitations should be adopted wholesale in to the developing law of the ADEA. While it is true that the ADEA joins the aforementioned statutes under the nominal banner of federal civil rights legislation, the structure and

relevant language of the ADEA are significantly different than those of the analogous sections of either Title VII or § 1988(b). The substitution of the phrase "any judgment" for "prevailing party" is an important modification, and I believe it warrants a different analysis.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA

ROMANO SALVATORI,

Plaintiff,

v. CASE NO. 96-371-CIV-ORL-19

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant.

_____/

ORDER

This cause came before the Court on the following matters:

1) Defendant Westinghouse Electric Corporation's Motion To Alter or Amend Judgment (Doc. No. 126, filed October 9, 1997), Defendant Westinghouse Corporation's Brief in Support of Its Motion To Alter or Amend Judgment (Doc. No. 127, filed October 9, 1997), and Plaintiff's Memorandum in Opposition to Westinghouse Electric Corporation's Motion to Alter or Amend Judgment (Doc. No. 136, filed October 21, 1997).

2) Plaintiff's Motion for an Award of Attorneys' Fees and Costs (Doc. No. 128, filed October 9, 1997), Memorandum in Support of Plaintiff's Motion for Attorney's Fees and Costs (Doc. No. 129, filed October 9, 1997), and Defendant Westinghouse Electric Corporation's Brief in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs (Doc. No. 138, filed October 23, 1997).

3) Plaintiff's Supplemental Motion for an Award of Costs (Doc. No. 130, filed October 10, 1997) and Defendant Westinghouse Electric Corporation's Brief in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs (Doc. No. 138, filed October 23, 1997).

Defendant Westinghouse Electric Corporation ("Westinghouse") contends that, because Plaintiff sought only monetary damages and recovered none, Plaintiff is not a "prevailing party" and cannot, therefore, recover attorney's fees or costs. Defendant also asserts that the evidence presented at trial was legally insufficient to support the jury's verdict that Westinghouse discriminated against Plaintiff due to his age and that, accordingly, judgment should be rendered for Defendant.

Plaintiff Romano Salvatori ("Salvatori") contends that he is entitled to fees and costs pursuant to the express terms of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"). Plaintiff asserts that he is not seeking fees and costs pursuant to Federal Rule of Civil Procedure 54(d) and that law relating to this provision is inapplicable to his motions for fees and costs. In addition, Plaintiff maintains that the principles applied to fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, and the Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988, are not pertinent here.

The Court begins its analysis with a basic observation that the terms of the Title VII and section 1988 fee-shifting provisions differ significantly from those of the ADEA fee-shifting provision. The Title VII and section 1988 provisions state that a court, in its discretion, may

allow the prevailing party to recover a reasonable attorney's fee as part of costs.[1] However, the ADEA fee and costs provision provides for a mandatory award of attorney's fees in addition to any judgment awarded the plaintiff. *See Shelton v. Ervin*, 830 F.2d 182, 183-84 (11th Cir. 1987); *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994). The provision states, "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 626(b).[2] Unlike the Title VII and section 1988 provisions, the ADEA provision makes no

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[1] The Title VII provision states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). Section 1988(b) provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title [,] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b).

[2] This provision is incorporated into the ADEA by reference to 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA").

mention of a court's discretion or a party's "prevailing" status. Moreover, the Eleventh Circuit has held that attorney's fees sought pursuant to section 216(b) are an integral part of the merits of the case and part of the relief sought therein. *Shelton*, 830 F.2d at 184.

The issue in this case is not whether Plaintiff is a "prevailing party" within the meaning of Rule 54(d) or the Title VII or section 1988 fee provisions, but rather is whether Plaintiff was awarded any judgment within the meaning of the ADEA fee provision. In other words, does a jury finding that Defendant discriminated against Plaintiff entitle Plaintiff to an award of attorney's fees and costs even though the jury determined that Plaintiff was owed no damages? The cases cited by Defendant are not helpful in deciding the precise issue before the Court. Defendant has cited cases concerning Federal Rule of Civil Procedure 54(d) and the Title VII and section 1988 fee-shifting provisions,[3] but no cases addressing the

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[3] According to Eleventh Circuit precedent cited by Defendant, "to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding" of discrimination. *Walker v. Anderson Electrical Connectors*, 944 F.2d 841, 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1078 (1993). According to United States Supreme Court precedent relating to section 1988 and cited by Defendant, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-13 (1992); *see also Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791-92 (1989); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In *Farrar*, the Supreme Court found that a plaintiff who wins even nominal damages is a prevailing party pursuant to

ADEA provision in a context similar to the instant one. Neither the cases cited by Plaintiff nor the Court's independent research has revealed any ADEA or FLSA cases on point. The plain meaning of the terms of the provision indicate that a court must award a plaintiff a reasonable attorney's fee and costs if the plaintiff received any judgment in his favor. In this case, Plaintiff received a favorable judgment that Defendant had violated the ADEA. Accordingly, it appears that this Court must award Plaintiff a reasonable attorney's fee and costs. This Court's interpretation of this provision furthers the ADEA's purpose of making Plaintiff "whole" and restoring Plaintiff to the economic position Plaintiff would have occupied but for the action Plaintiff undertook because of the illegal discrimination of Defendant. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988). It also fosters a public purpose in support of eliminating age discrimination in the workplace.

Based on the foregoing, the Court concludes that Defendant has not shown that it is appropriate for this Court to alter or amend its judgment by disallowing Plaintiff reasonable attorney's fees and costs. In addition, Defendant Westinghouse has not shown that there was insufficient evidence to support the jury verdict and,

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section 1988 because a judgment for damages in any amount modifies the defendant's behavior to the plaintiff's benefit. *Id.* However, even though a plaintiff who receives nominal damages is eligible to receive fees pursuant to section 1988, fees may still be denied because the degree of plaintiff's overall success goes to the reasonableness of the fee award. *Id.* at 113-15.

therefore, altering or amending the judgment on this basis is not warranted.

CONCLUSION

Based upon the foregoing, the Court makes the following ruling:

1) Defendant Westinghouse Electric Corporation's Motion to Alter or Amend Judgment (Doc. No. 126) is **DENIED.**

2) Plaintiff's Motion for an Award of Attorneys' Fees and Costs (Doc. No. 128) is **REFERRED** to the United States Magistrate Judge for Report and Recommendation.

3) Plaintiff's Supplemental Motion for an Award of Costs (Doc. No. 130) is **REFERRED** to the United States Magistrate Judge for Report and Recommendation.

DONE AND ORDERED at Orlando, Florida this, 4th day of February, 1998.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
All Counsel of Record

United States District Court

MIDDLE DISTRICT OF FLORIDA

Orlando Division

ROMANO SALVATORI,

V.

WESTINGHOUSE ELECTRIC CORPORATION.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 96-371 Civ-Orl-19

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury in the above entitled cause having found in favor of the plaintiff on his claim of Age Discrimination in Employment, and the jury having found that such discrimination was not willful and awarded no monetary damages on the issues of back pay, front pay or pension benefits, judgment is hereby entered in favor of plaintiff ROMANO SALVATORI on his claim and against the defendant WESTINGHOUSE ELECTRIC CORPORATION. Plaintiff may make application for his costs of action in accordance with the law and Rules of this Court.

September 26th, 1997
date

FILM ROLL: #93
DOCUMENT: #3998

/s/ RICHARD D. SLETTEN
Clerk

/s/ Louis Pirone
Louis Pirone
(By) Deputy Clerk